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Approaches to pregnancy under the law: a relational response to the current South African position and recent academic trends*

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OPSOMMING

Geregtelike benaderings tot swangerskap: 'n Relasionele respons op die huidige Suid-Afrikaanse posisie en onlangse akademiese denkrigtings

Hierdie artikel neem drie verskillende geregtelike benaderings tot swangerskap in oënskou en oorweeg die onderskeie aansprake om ongeborenes tot geboorte te beskerm. Die benaderings wat ondersoek word is die enkel-entiteitbenadering, die aparte-entiteite benadering en die nie-een-nie-maar-nie-twee-nie benadering. Daar is tekortkominge in beide die enkel-entiteit en die aparte-entiteite benaderings. Beide benaderings faal daarin om die relasionele karakter van swangerskap te akkommodeer aangesien ongeborenes beskou word as nie-entiteite tot voordeel van swanger vrouens of swanger vrouens se belange opsy geskuif word tot voordeel van ongeborenes. Die artikel gaan verder om die nadelige implikasies van hierdie twee benaderings te beklemtoon en voor te stel dat 'n relasionele benadering tot swangerskap opgeneem en gevolg word. Hierdie benadering word beliggaam in die nie-een-nie-maar-nie-twee-nie benadering en steun op die verhouding tussen swanger vrouens en ongeborenes om sodoende die waarde van beide die entiteite wat 'n swangerskap opmaak, te erken. Die nie-een-nie-maar-nie-twee-nie benadering lê tussen die twee uiterste benaderings van die enkel-entiteit benadering en die aparte-entiteite benadering. Die voorstel beliggaam in hierdie benadering is dat die waarde van ongeborenes erken moet word maar wel in verhouding tot swanger vrouens wat die ongeborenes dra. Die artikel bekyk die definisie van die nie-een-nie-maar-nie-twee-nie benadering, die skakels met relasionele feminisme en die moontlike toepassing daarvan in 'n Suid-Afrikaanse konteks. Die artikel benadruk dat regsprobleme wat ten opsigte van swangerskap, swanger vrouens of ongeborenes ontstaan, benader behoort te word vanuit die vertrekpunt van die geleefde en beliggaamde ervarings van swangerskap om sodoende die pad vorentoe te bepaal.

* The present article is based on, and is an adaption of, an unpublished paper, Pickles & Labuschagne "Pregnancy, foetal individuation, and claims to another's body: A relational response", Conference of the Society of Law Teachers of Southern Africa, Johannesburg Jan 2013.

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1 Introduction

This article identifies and examines three approaches that can be adopted in law when dealing with issues relevant to pregnancy, pregnant women and the unborn, and considers the appropriateness of each approach in respect of its aim of securing positive pregnancy outcomes and specifically protection of the unborn until birth. The three approaches discussed are the single-entity approach, the separate-entities approach, and the not-one-but-not-two approach (not one/not two). The article recognises that all authors referred to herein, as well as the author of the present article, seek to develop a model that can accommodate legitimate protection of the unborn in law. However, while the intentions of all concerned are the same, the approaches differ. Contrary to the approaches adopted by the authors discussed herein, this article seeks to emphasise that any issue in law that relates to pregnancy, pregnant women and the unborn must be approached in such a way that the reality of pregnancy, being one of embodied relationship, informs the debates going forward.

What the article shows is that South African law primarily adopts the single-entity approach to pregnancy. This approach entails viewing pregnant women as single entities, thus making the unborn non-entities under the law. However, this article highlights that there has been a noticeable trend in academic publications towards distinguishing the unborn from the pregnant women who carry them, and the unborn are singled out as entities in need of the law's direct protection. On the basis of scientific evidence, the unborn are individuated from pregnant women, thus justifying the call for the law's recognition of their independent status, either as legal persons or as a subcategory of legal subjects. Academics whose work is considered in this article maintain that the law's independent recognition of the unborn will better equip the law to protect them, thereby securing more positive pregnancy outcomes. These arguments speak to a separate-entities approach to pregnancy.

It is shown that the separate-entities approach is continuously being advanced despite the fact that the unborn exist and live entirely in and off pregnant women's bodies. The bodies that the unborn live off of belong to other legal persons, being pregnant women who are legal subjects with vested constitutional rights and duties of their own. This article takes the stance that both the single-entity and separate-entities approaches are an inadequate response to pregnancy under the law. In this respect, the article thus proceeds to consider, with approval, the not-one/not-two approach to pregnancy. It is demonstrated that this approach is rooted in relational feminism and is context-driven, in that it draws on women's perspectives of pregnancy. The not one/not two approach recognises the relationship that exists between pregnant women and fetuses during pregnancy, thus allowing space to value the

unborn – but only in relation to the pregnant women carrying them and only in so far as this recognition advances women’s rights.

The article first examines the current position with regard to pregnancy under South African law. Thereafter, a number of South African authors’ positions will be considered in so far as they argue for a revised approach to pregnancy. Their revised approach will be tested against relevant legal principles in order to determine whether such an approach in fact offers the protection envisaged. Finally, the article will draw on the not one/not two approach as a preferred approach to pregnancy.

2 Current Position of the Unborn in South Africa: The Single-entity Approach to Pregnancy

There is no known legislation that explicitly recognises the unborn as independent entities in South African law. In most instances, a child is defined as being below the age of majority, without specifying when that age begins. An example of this approach is to be found in section 28(3) of the Constitution of the Republic of South Africa, 1996, which states that a “child”, for purposes of section 28, means a person under the age of eighteen years.¹ Neither “age” nor “person” is defined, particularly in respect of when either begins or comes into being. While legislation does not expressly deny the unborn independent status, the common law does. Presently, the common law “born-alive” rule denies the unborn legal status and the title of “person”.² Unless legislation specifically trumps the common law position or the common law is developed through judicial precedent, any law applicable to persons therefore excludes those not yet born.³

The extent of the unborn’s status as a non-entity in view of the born-alive rule is significantly obvious when one considers the recent criminal law decision in *S v Makhakha*.⁴ In this case, a woman who was about seven months’ pregnant was one of the victims of a brutal rape and murder. While the accused was found guilty of the pregnant victim’s rape

1 The Children’s Act 38 of 2005 takes the same approach: see s 1(1) definitions.

2 Boezaart “Child law, the child and South African private law” in Boezaart (ed) *Child Law in South Africa* (ed Boezaart) (2009) 4. Here “person” is used in terms of its legal construction, rather than its social construction. The distinction between the two constructions can be found in Lupton *The Social Worlds of the Unborn* (2013).

3 Botha explains that it is presumed that legislation does not alter the common law more than is necessary, where it does, legislation will trump the common law. However, where there is no legislation dealing with the issue specifically, the common law position stands. See Botha *Statutory Interpretation: An Introduction for Students* (2012) 43.

4 2013 JDR 1934 (WCC).

and murder, the fact that a viable foetus was lost during the commission of the crime was not regarded as an issue worthy of the High Court's attention.⁵

Makhakha is noteworthy for purposes of this article because it demonstrates how deep-rooted South African law's perception is of pregnancy, that is, the law views pregnancy as a representation of pregnant women embodying a single entity. Seymour, with reference to the United States of America (USA), Canada and Australia, explains that this is the "body-part model" of pregnancy under the law.⁶ The single-entity approach means that "the fetus is simply part of the woman's body" and thus denies the unborn its "distinctiveness".⁷ The unborn is seen to be part of a woman's body in the same way that a room is part of a house; hence it is merely something akin to an organ that belongs to the body of a pregnant woman.⁸ Consequently, the single-entity approach withholds any vested and protectable interests or rights for as long as foetuses remain unborn.⁹

Succinctly stated, the South African legal position is that a person is one who is born alive and in whom legal subjectivity vests only at this moment.¹⁰ Boezaart defines a legal subject as "any entity that can have rights, duties and competencies".¹¹ Further, "legal subjectivity" is defined as "the characteristic of being a legal subject in legal interaction".¹² Consequently, as our law stands in respect of legal status, it appears that foetuses are distinguishable from the women carrying them (and all other live-born persons) in that they lack legal subjectivity. However, as will appear below, this position is now being challenged, because it is progressively being accepted that the unborn are not mere maternal tissue or non-entities.

3 Towards a Separate-entities Approach Emphasising Foetal Individuation

One way to emphasise that something "more" than only a woman is present during pregnancy is to rely on science and medical technology.

5 The judgment as reported does not include the sentence imposed and it is therefore not clear if the loss of foetal life even contributed to an increased sentence as a possible aggravating factor.

6 Seymour *Childbirth and the Law* (2000) 189.

7 *Idem* 190.

8 *Ibid.*

9 This position has been confirmed in a number of decided cases: *Pinchin v Santam Insurance* 1963 2 SA 254 (W); *Christian League of Southern Africa v Rall* 1981 2 SA 821 (O); *Van Heerden v Joubert* 1994 4 739 (A); *Friedman v Glicksman* 1996 1 SA 1134 (W); *Christian Lawyers of SA v Minister of Health* 1998 4 SA 1113 (T); *Road Accident Fund v Mtati* 2005 6 SA 215 (SCA) and *S v Mshumpa* 2008 1 SACR 126 (E).

10 Boezaart 4.

11 *Ibid.*

12 Kruger & Skelton (eds) *The Law of Persons in South Africa* (2010) 13.

Science tells us that there is life before birth and that this life, even though in the process of development, is genetically unique and constitutes more than mere maternal tissue.¹³ The separate-entities approach draws on these findings and emphasises that the unborn are distinct entities.

In this respect, the single-entity approach can be contrasted with the separate-entities approach. Seymour explains that the separate-entities approach to pregnancy views women and fetuses as if they were separate individuals of distinctive value with separable needs.¹⁴ In their separate existence, pregnant women and the unborn are seen to possess a range of enforceable rights or interests,¹⁵ ultimately leading to an understanding that the foetus is able to engage directly in legal relations for its own account, obviously not in its personal capacity but through third parties. It is generally contended that this approach is necessary to allow the law to better protect the unborn.

The separate-entities approach is viewed favourably by a number of South African academics.¹⁶ In some instances, authors adopt a separate-entities approach as a mechanism to extend personhood and rights,¹⁷ while others avoid a rights approach and develop a form of quasi-legal subject in respect of the unborn.¹⁸ "Quasi-legal subject" is used here because, even though some authors denounce a rights approach to protecting the unborn, they still argue for direct application of legal principles to the unborn.¹⁹ If one considers the meaning of legal subjectivity as including an element of legal interaction with a subject,²⁰ these authors have essentially gone on to argue for a subcategory of legal subjectivity.

13 Seymour 194; Palmer "Seeing and knowing: Ultrasound images in the contemporary abortion debate" 2009 *Feminist Theory* 173; Duden "The fetus on the 'farther shore': Toward a history of the unborn" in Morgan & Michaels (eds) *Fetal Subjects, Feminist Positions* (1999) 13; Casper "Operation to the rescue: Feminist encounters with fetal surgery" in *Fetal Subjects, Feminist Positions* 101 (Morgan & Michaels).

14 Seymour 190, 194.

15 *Idem* 194.

16 Du Plessis "Feticide: Creating a statutory crime in South African law" 2013 *Stel LR* 73; Jordaan "The legal validity of an advance refusal of medical treatment in South African law (Part 1)" 2011 44(1) *De Jure* 32; Ovens "A criminological perspective on the prenatal abuse of substances during pregnancy and the link to child abuse in South Africa" 2010 *Child Abuse Research: A South African Journal* 38; Pillay "The beginning of human personhood: Is South African law outdated?" 2010 *Stel LR* 230; De Freitas & Myburgh "The relevance of science for the protection of the unborn" 2009 *Journal for Christian Scholarship* 61; & Kruuse "Fetal 'rights'? The need for a unified approach to the fetus in the context of feticide" 2009 *THRHR* 126.

17 Ovens 2010 *Child Abuse Research: A South African Journal* 38 & Pillay 2010 *Stel LR* 230.

18 Du Plessis 2013 *Stel LR* 73; Jordaan 2011 44(1) *De Jure* 32; De Freitas & Myburgh 2009 *Journal for Christian Scholarship* 61 & Kruuse 2009 *THRHR* 126.

19 *Ibid.* The authors' arguments will be discussed further in para 3 1.

20 Boezaart 4.

In essence, the separate-entities approach is used as a means to justify the call for individualised legal protection. Some authors call for protection from third parties,²¹ while others call for protection from the pregnant women who carry the unborn.²² The relevant issue, however, is to understand the approach adopted by the various authors rather than focusing on the individual arguments necessitating this approach. Therefore, the merits of the arguments mentioned will not be engaged.

This article will consider both the issue of advancing personhood and of developing quasi-legal subjectivity. However, the main focus will fall on those positions that employ the separate-entities approach as a ground to extend personhood and rights, the intention being to determine whether this reframed approach to pregnancy effectively offers the protection that the authors concerned expect. The article will then go on to reject the separate-entities approach in its entirety and, in that discussion, also dismiss the issue of quasi-legal subjectivity.

3 1 Separate-entities Approach as a Basis for Quasi-Legal Subjectivity

According to *S v Mshumpa*, the common law crime of murder does not extend to the unborn.²³ The court thus confirmed that the victim must have been a living person at the time of the murder.²⁴ It further found that, where a pregnancy is terminated as a result of third-party violence, it is not the murder of the foetus that is at issue, but rather, as a result of their “unique togetherness”, an assault on or attempted murder of the pregnant woman.²⁵

There are two academic responses to this case. In each, the authors grapple with the idea of criminalising the termination of a pregnancy as a result of the infliction of violence by a third party. Du Plessis, interprets *Mshumpa* as offering indirect protection to the unborn and rejects such an approach as being insufficient.²⁶ Instead, Du Plessis advocates for a statutory crime of feticide and calls for the recognition of the unborn, from conception onwards, as potential victims of violent crime in their own right.²⁷ She discredits personhood as being necessary for protection in law and suggests moving beyond a rights discourse when debating

21 Du Plessis 2013 *Stel LR* 73 & Kruuse 2009 *THRHR* 126.

22 Jordaan 2011 44(1) *De Jure* 32 & Ovens 2010 *Child Abuse Research: A South African Journal* 38; Pillay 2010 *Stel LR* 230 & De Freitas & Myburgh 2009 *Journal for Christian Scholarship* 61.

23 *Op cit* 149 D-F.

24 In this case, a woman’s late-term pregnancy was terminated as a result of the infliction of violence against her body. As the law stands, there is no criminal offence of third-party foetal violence that results in the termination of a pregnancy. See Pickles “The introduction of a statutory crime to address third-party foetal violence” 2011 *THRHR* 546.

25 151 I.

26 Du Plessis 2013 *Stel LR* 73 74-75.

27 *Ibid.*

issues involving the unborn.²⁸ The core element of her argument is protection of the unborn “irrespective and independent of its location or relationship to the mother”.²⁹

Kruuse, also expressing dissatisfaction with the outcome in *Mshumpa*, rejects the single-entity approach and calls for the introduction of the crime of feticide, being a crime that can be perpetrated against the unborn only.³⁰ This approach is justified on the grounds that the unborn are something distinct from the pregnant women who carry them, and that the value of human dignity, symbolising inherent human worth, warrants this approach.³¹ In this respect, Kruuse states:³²

The issue here is that, despite the ‘me-but-not-me’ image ... the fetus is a distinct organism from the mother and cannot be treated as a bit of human tissue of the mother comparable to her kidney, one of her appendages or her appendix. It is a separate living organism, whose destruction is something to be regretted in itself regardless of what has happened to the mother carrying it.

Turning to private law, in the context of termination of pregnancy, De Freitas and Myburgh argue for the legal protection of the unborn from “abortion”.³³ They advocate a non-rights approach, thereby asserting that the right-to-life argument is not necessary when seeking to develop grounds to justify legal protection of the unborn from the women who carry them.³⁴ The authors unequivocally draw on the separate-entities approach by using science to demonstrate that the unborn are more than mere maternal “tissue” and embody a distinct human life which has independent value, characteristics that are present from the moment of conception.³⁵ Throughout, they refrain from making any reference to or engaging in a discussion that recognises the unborn in relation to the pregnant women who carry them.

The separate-entities approach also presents itself in the context of medical treatment of pregnant women, specifically concerning contemporaneous or advanced refusal of medical treatment.³⁶ Jordaan considers the legal status of advanced medical directives and

28 Du Plessis 2013 *Stel LR* 76, 87-90.

29 *Idem* 77.

30 Kruuse 2009 *THRHR* 126.

31 Kruuse 2009 *THRHR* 134-136.

32 *Ibid.*

33 De Freitas & Myburgh 2009 *Journal for Christian Scholarship* 61.

34 *Idem* 65-70.

35 *Idem* 74-81.

36 Advanced refusals to submit to life-sustaining medical treatment can take the form of a living will where a person expresses their wishes concerning future medical treatment. This document will then be considered in cases where medical treatment is necessary, but the patient is unable to communicate his or her preferences regarding the impending medical treatment. Advanced directives are helpful in cases where patients are in a persistent vegetative state. For more on this, and on the current legal status of living wills, see Carstens & Pearmain *Foundational Principles of South African Medical Law* (2007) 208-210.

convincingly argues that the right to make a decision to refuse medical treatment is a constitutionally informed right.³⁷ She therefore argues for the legal recognition of advanced directives on the same grounds, since the same constitutional principles are at play.³⁸ In this context, Jordaan approvingly refers to the situation in other jurisdictions and states:³⁹

[T]he 'potential interests' of the foetus to be born alive should be considered before giving effect to the wishes of a pregnant patient to refuse medical treatment, irrespective of whether such wishes were expressed in a contemporaneous decision by a competent patient or at a previous stage in an advanced directive.

In all the examples considered thus far there has been a call for direct and individual protection of the unborn, but without going so far as founding this call on the rights of the unborn or by extending legal subjectivity. However, there are two examples where foetal individuation has led to the call for the extension of rights to the unborn. As will be discussed below, one of these examples advocates for the extension of personhood, and therefore for the protection of the unborn as legal persons.

3.2 Separate-entities Approach as a Basis for Personhood

In the context of criminal law, Ovens calls for the protection of the unborn from drug-dependent pregnant women by extending the definition of child abuse to include "damage" caused to the unborn in the case of the prenatal use of drugs by pregnant women.⁴⁰ Ovens' approach can be interpreted as bestowing on the unborn an enforceable right, as against the pregnant women carrying them, to be born in a healthy (specifically, non-drug exposed) condition. Where this right is not respected, Ovens proposes that the women concerned be held criminally liable, since their conduct would amount to child abuse.⁴¹ Ovens' work derives from a criminological perspective and she therefore engages with the legal meaning of rights. She only briefly mentions applicable legal principles and it is therefore not clear whether her intention is to extend personhood and advocate for foetal rights generally. While Ovens does use the term "rights" in respect of the unborn, it is not obviously clear whether she is using that term in a technical legal sense.

Pillay argues that advances in medical science and technology have rendered the born-alive rule redundant, in that these advances prove the presence of life before birth.⁴² The author maintains that the concept of personhood should adequately reflect medical knowledge of prenatal life

³⁷ Jordaan 2011 44(1) *De Jure* 32.

³⁸ *Ibid.*

³⁹ *Idem* 44.

⁴⁰ Ovens 2010 *Child Abuse Research: A South African Journal* 38.

⁴¹ *Idem* 45-46.

⁴² Pillay 2010 *Stel LR* 230-236.

and, in so doing, include viable fetuses within its conceptual framework.⁴³ Pillay's argument is as follows:⁴⁴

In the abortion context, the attribution of foetal rights would constitute a radical departure from the prevailing legal position which focuses solely on the rights of pregnant women. As this unequal power relationship is challenged, both the judiciary and the medical profession will have the opportunity to adopt a more transparent, principled and balanced approach in resolving maternal-foetal conflicts. In the non-abortion context relating to third party criminal acts directed against pregnant women, the attribution of foetal rights would give expression to the legal convictions of the community which demand *separate* protection of the foetus through laws proscribing murder and assault of the foetus.

All the authors considered here, in respect of quasi-legal subjectivity and personhood, adopt an approach to pregnancy that clearly follows the separate-entities approach, thereby highlighting a trend towards preferring this approach to the single-entity approach. Each example individuates the unborn from the pregnant women carrying them, assigns independent value in their separateness and, from there, proceeds to justify individualised, foetal-specific legal protection to the exclusion of pregnant women. A consequence of this approach is that women are side-lined or turned into obscure non-entities. In doing so, all the authors fail to understand women as an indispensable element for prenatal existence and, ultimately, the reality of pregnancy as embodying connection is wholly ignored.

4 Personhood as Offering Sufficient Protection for the Unborn: An Examination of Thomson's "Defense of Abortion"

Clearly, there are varying degrees of consequence stemming from the application of the separate-entities approach to pregnancy, the more extreme being the extension of personhood and foetal rights and the less extreme being merely developing a quasi-legal subject. While there is concern with the general application of the separate-entities approach to pregnancy, the more pressing issue is to consider whether employing the separate-entities approach as a ground for foetal rights in fact protects the unborn and gives it legal leverage over third parties, specifically pregnant women.⁴⁵ Further, it needs to be considered whether giving heed⁴⁶ to this suggested approach quashes "maternal-foetal conflicts" and simplifies the issue of pregnancy under South African law generally.

43 *Idem* 236.

44 *Idem* 236-237. Footnotes omitted from the quotation.

45 As envisaged by Pillay 2010 *Stel LR* 230 and possibly by Ovens 2010 *Child Abuse Research: A South African Journal* 38.

46 It must be noted that the phrase "giving heed" is used because, in *Christian*

Concerning the notion of rights providing legal leverage for the unborn, both Kruuse and McCreath J adopt the stance that granting rights to the unborn will certainly offer the unborn protection, particularly against unfavourable maternal conduct.⁴⁷ In *Christian Lawyers* (1998) per McCreath J, it was found that *if* the right to life in section 11 of the Constitution were to be interpreted as applying to fetuses, fetuses would have separate claims to life and lawful termination of pregnancies would ultimately constitute murder – even if the termination of pregnancies were medically indicated to preserve the lives of the pregnant women concerned.⁴⁸ Kruuse adopts a more nuanced approach and asserts that, if the unborn are vested with legal subjectivity and thus the right to life, it would mean that the right to terminate a pregnancy would be impossible to justify, except where the pregnant woman's life is in danger.⁴⁹ Later, Kruuse explains that the unborn's right to life is a right that is not capable of being outweighed by a woman's rights generally, meaning that the unborn's right to life will always take preference over a woman's rights, aside from her right to life.⁵⁰ The separate-entities approach, applied in this way, seems to create a situation where Pillay's "maternal–foetal conflicts" are done away with, because the right to life will always hold more weight than rights vested in others, including those of pregnant women, as emphasised by Kruuse and McCreath J. Therefore, the positions of Pillay, Kruuse and McCreath J all complement the premise that a rights-based approach could possibly serve as a workable method for protection of the unborn. However, further reflection on this issue reveals a different perspective.

4 1 Thomson's "Defense of Abortion" and Supporting South African Principles

Thomson⁵¹ offers a thought-provoking, if extreme, counter-argument to

Lawyers of SA v Minister of Health 1998 4 SA 1113 (T) (*Christian Lawyers* (1998)), the separate-entities approach was unequivocally rejected when the court found that the provisions of the Constitution did not apply to the unborn.

47 Although it must be noted that both suggest not taking a rights-based approach. See respectively Kruuse 2009 *THRHR* 133-135 and *Christian Lawyers* 1998 1122 I-1123 C.

48 1122 I. Here, the court understood that, where a foetus is granted rights, it could use those rights as a means to protect itself from termination of pregnancy for any reason whatsoever. However, it must be recognised that this position is unfounded, since principles of private defence (if a fatal pregnancy is construed as an attack on a woman's body) or necessity justify the termination of a pregnancy in cases where continued pregnancy poses a threat to a woman's life. See Snyman *Criminal Law* (2009) 103-123 for a detailed discussion of private defence and necessity as grounds of justification.

49 Kruuse 2009 *THRHR* 133.

50 *Idem* 135.

51 Thomson "A defense of abortion" 1971 *Philosophy & Public Affairs* 47. While this article does not focus on justifying termination of pregnancies, Thomson's argument transcends the abortion debate and has application

the above. Her work is so well known⁵² that it is not clear why her publication has not been considered by those contemplating the consequences of foetal rights.⁵³ Thomson uses the example of waking up to find that a violinist has been attached to your body in order to gain the benefit of the function of your kidneys, and this attachment was necessary for purposes of keeping the violinist alive. The crux of the issue is that the violinist was attached to your body without your consent. Thompson's entire article revolves round this hypothetical anecdote and she raises challenging questions as to whether anything can be done to remove the attachment, even though removal would result in the violinist's death.

In this context, Thomson goes on to suggest that we imagine the unborn as legal persons with the right to life, like the violinist, and further suggests that, generally, the right to life includes the right to be given at least the bare minimum that one needs for continued life.⁵⁴ She then poses the following question: What would the situation be where the bare minimum that one needs to sustain life turns out to be something that one does not have a right to?⁵⁵

This question becomes relevant when, for purposes of sustaining life, one needs the continued use of another's body. The problem is that the mere presence of need does not create an enforceable right against another. Thomson contends that:⁵⁶

... nobody has the right to use your kidneys unless you give him such a right; and nobody has the right against you that you shall give him this right – if you do allow him to go on using your kidneys, this is a kindness on your part, and

in any argument that attempts to accord rights to the unborn. This will become apparent as the argument against the separate-entities approach develops.

52 According to Google Scholar, and as at 20 Dec 2013, Thomson's article had been cited 1 119 times, and her book of the same title had been cited 67 times. See [http://scholar.google.co.za/scholar?hl=en&q=Thomson + %22&bntG=&as_sdtp](http://scholar.google.co.za/scholar?hl=en&q=Thomson+%22&bntG=&as_sdtp) (accessed 2013-12-20). Also see Kaczor *The Ethics of Abortion: Women's Rights, Human Life, and the Question of Justice* (2010) 145 who cites Thomson's article as "the most famous article ever written about the subject of abortion". This is not to say that her work is unquestionably accepted, for instance see Boonin *A Defense of Abortion* (2003) 133-276. Boonin, while defending Thomson's position, cites and discusses sixteen different objections to Thomson's argument. There are sure to be more though.

53 The only authors cited in this article who refer to Thomson are De Freitas & Myburgh 2009 *Journal for Christian Scholarship* 69-70 and Du Plessis 2013 *Stel LR* 88 – although these authors only cite authority that takes a stand against Thomson's position. The authors are in opposition to Thomson, because they are attempting to justify protection of the unborn without adopting a rights approach. Their approach could possibly have been motivated by Thomson's convincing argument that a rights approach may be legally problematic and overly complex for anyone seeking to protect the unborn on that basis.

54 Thomson 1971 *Philosophy & Public Affairs* 55.

55 *Ibid.*

56 1971 *Philosophy & Public Affairs* 55.

not something he can claim from you as his due. Nor has he any right against anybody else that *they* should give him continued use of your kidneys.

Ultimately, Thomson's argument is that having the right to life does not guarantee the use of that right.⁵⁷ Where right of use is provided, it is done because one is a "good Samaritan".⁵⁸ She views continued pregnancy as a case of women acting as good Samaritans, in that there is no legal obligation on them to make the sacrifices that are necessary in order for the unborn to sustain prenatal life.⁵⁹ In this respect, Thomson questions whether engaging in voluntary sexual intercourse is an indication of consent to a resulting pregnancy, thus giving rise to an obligation, and she answers this in the negative.⁶⁰ She convincingly states:⁶¹

If the room is stuffy, and I therefore open a window to air it, and a burglar climbs in, it would be absurd to say, 'Ah, now he can stay, she's given him a right to the use of her house – for she is partially responsible for his presence there, having voluntarily done what enabled him to get in, in full knowledge that there are such things as burglars, and that burglars burgle.

Similarly, Karnein argues that, although women may be partly responsible for conception, given that contraception is readily available in this day and age, there is a limit to the amount of responsibility that can accrue for something that women would have to go out of their way to prevent, especially if what is being prevented is a natural process of reproduction.⁶² She explains:⁶³

[W]hile persons can be asked to make significant sacrifices to save those they have deliberately pushed into the water, women cannot be asked to provide a substantial amount of assistance to someone who came into existence because they did not prevent a 'natural' process from occurring.

Thomson's argument holds true in South Africa and is of particular importance in the context where personhood is extended to the unborn. There is no known South African case law or legislation that compels another to forsake their bodies, or portions thereof, in order for another to sustain his or her life. Labuschagne,⁶⁴ drawing from laws regulating donation,⁶⁵ argues that, generally, no one has a claim to another's body without that person's informed consent, and she demonstrates this to be

⁵⁷ 56.

⁵⁸ Generally, Thomson's argument is cited as the "Good Samaritan Argument": see Boonin 133.

⁵⁹ Thomson 1971 *Philosophy & Public Affairs* 63.

⁶⁰ *Idem* 57-58.

⁶¹ *Idem* 58-59.

⁶² Karnein *A Theory of Unborn Life: From Abortion to Genetic Manipulation* (2012) 24.

⁶³ *Ibid.*

⁶⁴ Pickles & Labuschagne *supra*. The argument presented here is Labuschagne's portion of the paper that she researched and later presented.

⁶⁵ Specifically, the National Health Act 61 of 2003, and case law and common law principles relevant to informed consent.

a well-established principle under South African law. On that note, Labuschagne warns that this principle acts to the detriment of any aims to protect the unborn as legal persons.

Labuschagne further contends that, since the unborn live off the bodies of pregnant women and gain the benefit of pregnant women's bodily functions, a pregnancy can be understood as representing a relationship of donation, because one person is using another person's body to sustain life.⁶⁶ Accordingly, if the unborn were persons, they would need pregnant women's informed consent to continue gestating.⁶⁷ However, Labuschagne explains that the principle of informed consent requires that, in order for the consent to be informed, the person must have a knowledge and appreciation of what is being consented to prior to the donation. Given that pregnancy is fairly unpredictable in terms of what resulting procedures may be necessitated by deciding to be pregnant, it is Labuschagne's contention that no true informed consent can ever actually be obtained. Where informed consent is lacking, as would be the case for all pregnancies, even planned ones, the person whose body is being used is essentially being assaulted.⁶⁸

Labuschagne thus affirms that no one can be compelled to make a donation, even where it would amount to life-saving treatment.⁶⁹ These principles therefore support Thomson's premise that continued gestation is an act that only good Samaritans would perform, since, technically, there is no obligation on them to make the sacrifices necessary for the unborn to sustain life.

4 2 Implications of Foetal Individuation and the Extension of Rights Based on the Separate-entities Approach

The separate-entities approach, despite going so far as to create the foundation for foetal rights, does not in fact provide the intended protection. If applied in a strict, uncompromising sense, it actually serves as a ground to justify the termination of pregnancies for reasons beyond the threat to life of pregnant women.⁷⁰ Terminations could take place at any time during gestation, because there is absolutely no obligation on anyone to be a good Samaritan for any designated period of time.

66 See s56 of the National Health Act, which makes provision for the donation and use of living persons' tissue, being blood, blood products and gametes.

67 As required in terms of ss6 & 7, read together with ss55 & 66 of the National Health Act.

68 For the consequences of not having obtained informed consent, see Carstens & Pearmain 890-891.

69 Here, Labuschagne refers to *Palmer v Palmer* 1955 3 SA 56 (O); *S v Goliath* 1972 3 All SA 69 (A); *Castell v de Greef* 1994 4 SA 408 (C).

70 Thomson does not adopt such an extreme approach, but tones down her argument by referring to and considering issues such as "justifiable killing". Moreover, she recognises that, at times, there are things that one "ought to do" or that some things are "morally unacceptable".

It is submitted that this approach can be taken to absolute extremes. For instance, where women permit the continued pregnancy, out of “kindness”, there is no known authority in law that would compel a woman to conduct herself in a way that would increase the quality of her kind act. In other words, the right to life may not guarantee that, when kindness prevails, one will have an enforceable authority pertaining to the quality of that kindness. Placing this in the context of pregnancy, the unborn will not have a right to dictate the condition in which the body is kept. These assertions speak specifically to concerns that substance abuse during pregnancy constitutes child abuse. Should a ground be developed to provide the unborn with an enforceable claim to optimal quality of the kindness it receives, another extreme position can be taken, namely that, where a charge of child abuse looms as a result of substance abuse while pregnant, pregnant women could very simply terminate their pregnancies.

Ultimately, this approach creates the space to voluntarily terminate viable but pre-term pregnancies, and this cannot be seen as serving important developmental needs of fetuses. Pre-term deliveries pose a number of health issues, and long-term medical and social risks,⁷¹ and can hardly be seen as a positive outcome associated with foetal rights.

The potential outcomes of this approach are rather offensive. A separate-entities approach to pregnancy blatantly introduces conflicts and creates an environment for head-on adversarialism between pregnant women and their fetuses and, ultimately, strikes at the core of the relationship that pregnancy represents. Further, this stance towards pregnancy does not foster optimal health for the fetus.

71 For instance, see Pignotti & Donzelli “Perinatal care at the threshold of viability: An international comparison of practical guidelines for the treatment of extremely preterm births” 2008 *Pediatrics* 193. The authors point out that extremely premature neonates will usually die during or very soon after birth and, for those who do survive, childhood death is very likely. Also see Moster, Lie & Markestad “Long-term medical and social consequences of preterm birth” 2008 *New England Journal of Medicine* 262. If premature neonates survive, the authors highlight that medical and social disabilities increase in relation to neonates’ decreasing gestational age at birth. In the long term, premature infants are likely to progress through adulthood suffering medical disabilities (being cerebral palsy, mental retardation or other neurological disorders), behavioural and psychological problems (being autism and schizophrenia), and may experience learning disabilities.

5 Rejecting the Single-entity and Separate-entities Approaches: Pregnancy as a Relational Construction and the Not-One-But-Not-Two Approach

Seymour,⁷² and all the other South African authors referred to in this article, correctly reject the single-entity approach as irreconcilable with scientific fact. The single-entity approach denies the distinctive existence, the “extra-ness”, that the foetus embodies during a continued pregnancy. The unborn are biologically and genetically distinct from the pregnant women who carry them, and women are “whole” with or without the presence of prenatal life.⁷³ In this respect, the current South African approach to pregnancy is flawed, and the existence of the foetus cannot continue to be overlooked for much longer.

Flaws inherent in the single-entity approach must be understood beyond what science tells us. Seymour explains that some argue for the retention of this approach because it secures female autonomy during pregnancy, that is, if the foetus is considered as merely constituting part of a body, women will still enjoy the space for freedom of choice – in other words, whether or not to terminate the pregnancy.⁷⁴ However, this is a very superficial and one-sided understanding of female autonomy during pregnancy.

Female autonomy must also recognise women’s vested interests in their unborn. Therefore, female autonomy must be understood as including the decision to continue with a pregnancy, as well as decisions on *how* to progress through pregnancy. This manifestation of autonomy must be protected in law in order for it to have any meaningful effect for women who want children. Consequently, the single-entity approach only speaks to one side of female autonomy and fails to assist those women who plan to continue with their pregnancies and to adequately protect such decisions. For instance, Seymour refers to an example where a pregnant woman is unlawfully attacked and, as a result miscarries,⁷⁵ a situation similar to that in *Mshumpa*. Here, the single-entity approach prevents the law from responding to her loss of a

⁷² Seymour 191.

⁷³ *Ibid.* Seymour refers to, and quotes from, MacKinnon’s work: See MacKinnon “Reflections on sex equality under law” 1991 *Yale LJ* 1281, 1313-1316. MacKinnon at 1314, also rejects the separate-entities approach to pregnancy under the law and describes the foetus as a separate organism comparable to a parasite. However, the foetus’s dependence does not make it a body-part belonging to the pregnant woman.

⁷⁴ Seymour 193.

⁷⁵ 193-194.

pregnancy that she had an interest in, because the foetus is not recognised in law.⁷⁶

Ultimately, the single-entity approach fails not only to speak to scientific fact, but also to comprehensively engage female experiences and expectations of pregnancy, feminine issues related to pregnancy continuation, and the resulting consequences of pregnancy for parenthood.

That said, South African authors referred to in this article go on to suggest adopting the separate-entities approach to allow the law to be true to scientific revelations about prenatal life.⁷⁷ Yet, Seymour explains that, while the single-entity approach forecloses the possibility for intervention on behalf of the unborn, the separate-entities approach invites intervention and conflict.⁷⁸ However, it should be remembered that the discussion of Thomson's "good Samaritan" argument demonstrated that the extent of conflict will obviously depend on whether the separate-entities approach is adopted to justify personhood before birth or whether it is used to develop a quasi-legal subject for the unborn.⁷⁹

Earlier in the article, it was established that the separate-entities approach, which accords rights to the unborn, in fact fails to protect the unborn.⁸⁰ However, the attribution of quasi-legal subjectivity also fails because it is founded on the separate-entities approach more generally. The separate-entities approach strikes at the core of the embodied reality of pregnancy. It denies pregnancy's very nature, being one of relationship and factual connectedness, by directly engaging with the unborn through the application of legal principles. The central issue as regards the separate-entities approach is that it almost completely negates the significance of the existence of women.⁸¹ Women and their bodies cannot be bypassed, ignored or made invisible: They are

76 Through the infliction of violence, a woman's decision to have a child was interfered with, but no one can be held accountable for that interference because, prior to birth, the foetus does not exist. The same issue arises in the case where, as a result of medical negligence, a woman who continues with a pregnancy and intends to give birth to a live child, delivers a stillborn child. The single-entity approach precludes any recourse, because the foetus, as a non-entity, never acquired legal personality owing to medical negligence preventing live birth. Also, if the existence of the unborn is denied in law, it is not clear how pregnant women can claim extra medical attention or state support that is needed in order to progress safely through wanted pregnancies.

77 De Freitas & Myburgh 2009 *Journal for Christian Scholarship* 61; Kruuse 2009 *THRHR* 126; Ovens 2010 *Child Abuse Research: A South African Journal* 38; Pillay 2010 *Stel LR* 230; Jordaan 2011 *De Jure* 32; Du Plessis 2013 *Stel LR* 73.

78 Seymour 200.

79 See para 4 *supra*.

80 *Ibid*.

81 Karpin "Legislating the female body: Reproductive technology and the reconstructed woman" 1992 *Colum J Gender & L* 325-327.

essentially a *sine qua non* for the existence of prenatal life. Seymour further points out that the more the separate-entities approach individuates the unborn, the less the individuality of women is recognised.⁸²

Thus, while science does demonstrate the unique genetic character of the unborn, Karpin convincingly argues as follows:⁸³

There is no scientifically verifiable 'fact' that designates woman and fetus as separate. There are only scientific descriptions that hypothesize the notions of separateness, and certain descriptions are being privileged over others. For example, the scientific 'fact' that the fetus and mother are genetically different does not answer the question of whether the description of them as separate is appropriate.⁸⁴

It is submitted that the separate-entities approach to pregnancy can only ever be justified in the abstract and in the context of hypothetical anecdotes. This is especially true where foetal separateness leads to direct engagement with the unborn in the context of law, being direct application of rights and legal doctrines or principles. Thomson's hypothetical application of rights to the unborn, while viewed as the correct use of legal principles in the context of competing rights bearers, must ultimately be rejected for its underlying reliance on the separate-entities approach and thus for its failure to encompass a proper reflection of pregnancy.⁸⁵ The reality of pregnancy does not speak to an approach based on separateness. One cannot ever, regardless of the designation of separateness, directly engage with the unborn in any tangible way, since the unborn exist in a factually non-permeable⁸⁶ environment, that is, within the body of a woman. It is this embodied connection that must be acknowledged, since this connection absolutely prevents direct contact

82 Seymour 195.

83 Karpin 1992 *Colum J Gender & L* 326.

84 To emphasise this point, it is worthwhile referring to Herring & Chau "My body, your body, our bodies" 2007 *Medical LR* 34, 45-47. The authors, in debating whether one owns one's body, turn to medical science to *prove* the interconnection of bodies. In fact, they start off with pregnancy and define it as a relationship of shared space and fluids. They justify their position by referring to scientific studies pertaining to the development of the placenta and its role in ensuring optimal foetal development through its connection to the body of pregnant women.

85 After highlighting the weakness in the foetal rights arguments, Thomson (1971) *Philosophy & Public Affairs* 58 suggests that we focus on the unique dependency of the unborn on pregnant women, and view this dependency as a source of a "special kind of responsibility" a pregnant woman will have towards the unborn she carries. This responsibility is special because it is not something that can be claimed by other independent persons. This approach is founded on the relationship shared between the unborn and pregnant women.

86 Karpin (1992) *Colum J Gender & L* 333 states that technology, for instance ultrasonography, has led to the impression that the female body is permeable and flexible to outside curiosities, and argues that pregnant women are viewed as passive foetal containers in the sense that they are denied the capacity to carry the unborn and determine their boundaries.

or interaction between the unborn and others. Here, “others” must be understood to include third parties, such as the outside community and the medical profession, and the law with its legal principles.

Rejecting both the single-entity and separate-entities approaches does not leave the issue of pregnancy under the law unresolved. Seymour suggests that there is a third approach that can be adopted when confronting pregnancy in law, namely the not one/not two approach.⁸⁷ This approach to pregnancy is seen to lie between the two extremes of the single-entity and the separate-entities approaches to pregnancy, thus offering a middle ground.⁸⁸ The not one/not two approach is defined as a female view of pregnancy.⁸⁹ MacKinnon provides a description of the unborn from a female perspective that validates this approach:⁹⁰

More than a body part but less than a person, where it is, is largely what it is. From the standpoint of pregnant women, it is both me and not me. It ‘is’ the pregnant woman, in the sense that it is in her and of her and is hers more than anyone’s. It is ‘not her’ in the sense that she is not all that is there. In a legal system that views the individual as a unitary self, and that self as a bundle of rights, it is no wonder that the pregnant woman has eluded legal grasp, and her fetus with her.⁹¹

The focus on the relationship allows for the recognition of the following elements as stemming from the existence of a pregnancy: United needs; interconnectedness; mutuality; and reciprocity.⁹² Essentially, it advocates a view and embeds understanding that pregnant women and fetuses cannot be viewed in isolation. The not one/not two approach allows a fetus to be recognised as a distinct entity, but it also expresses an unequivocal reminder of the relationship shared between a

She understands this to be a technocultural phenomenon based on ultrasonography, with viewers of prenatal ultrasound scans coming to (mistakenly) understand the uterus as permeable as a result of being able to view the unborn prior to birth.

87 Seymour 199. Also see, generally, Karpin 1992 *Colum J Gender & L* 325.

88 Seymour 190, 202.

89 Seymour 199; MacKinnon 1991 *Yale LJ* 1281, 1309, 1313-1314. MacKinnon explains that the legal system has failed to adequately conceptualise pregnancy and the relationship between pregnant women and fetuses, because the interests, perceptions and experiences that have shaped the law on this topic are those of men and development has occurred to the exclusion of women. This is problematic, because pregnancy is a female experience, thus resulting in the development of principles from a disadvantaged outsider perspective.

90 MacKinnon 1991 *Yale LJ* 1316. Footnotes omitted from the quotation.

91 Lupton’s studies support MacKinnon’s position: See Lupton 53-56. Lupton recognises that some women do understand their pregnancies as housing a separate individual. However, even within the perception of foetal individuation, all women understood the fetus to be in and somewhat part of their bodies, and thus not completely apart from them.

92 Seymour 190.

pregnant woman and her foetus.⁹³ Therefore, this approach acknowledges that foetuses have interests, but that these interests must be promoted in a way that acknowledges women's rights.⁹⁴

In order to achieve the aim of advancing the unborn's interests in such a way that women's rights are promoted, the not one/not two approach to pregnancy is context-driven, meaning that the relationship between pregnant women and foetuses must be understood in terms of the context in which that relationship exists. It is only through the process of including context that one can determine if intervention in pregnancy is necessary and what the nature of such intervention should be. Where legal intervention is found to be necessary, context would assist in determining whether such an intervention would amount to an acknowledgment or infringement of women's rights.⁹⁵

Seymour sees this approach as being flexible.⁹⁶ Firstly, it acknowledges value in the unborn, but denies them their separateness.⁹⁷ Secondly, it enables women's rights to be included and considered.⁹⁸ Thirdly, it sets the scene for the protection of the unborn when their interests are threatened by a third party, but may produce different results when the interests of the unborn are threatened by the pregnant women carrying them.⁹⁹

On the issue of harm caused by pregnant women, Seymour argues that this approach does not provide absolute legal immunity for pregnant women.¹⁰⁰ While the author goes on to assert that female autonomy

93 *Idem* 200. This approach echoes the principles of relational feminism, thus supporting MacKinnon's premise that the not one/not two approach is a female perspective on pregnancy. Relational feminism understands individuals as constituting an intricate web of relationships, all of which are characterised by interdependence and mutuality. For more on the theory of relational feminism, see Van Marle & Bonthuys "Feminist theories and concepts" in Bonthuys & Albertyn (eds) *Gender, Law and Justice* (2007) 35-37. For examples of the practical application of relational feminism, see McConnell "Relational and liberal feminism: The 'ethic of care', fetal personhood and autonomy" 1996 *West Virginia LR* 291; Ordolis "Maternal substance abuse and the limits of the law: A relational challenge" 2008 *Alberta LR* 119; Laufer-Ukeles "Reproductive choices and informed consent: Fetal interests, women's identity, and relational autonomy" 2011 *American Journal of Law and Medicine* 567. Also see Pickles *S v Mshumpa: A Time for Law Reform* (LLM dissertation 2008 UP) 124-126, 133-134. It must be noted that Pickles does not use the term "relational feminism", but the adopted approach certainly ties in with the concept of relational feminism in the context of pregnancy.

94 Seymour 200.

95 *Ibid.*

96 *Idem* 201-202.

97 *Idem* 201.

98 *Ibid.*

99 *Ibid.*

100 *Idem* 202.

plays a crucial role in determining their immunity,¹⁰¹ it is suggested that absolute freedom during pregnancy may never be in place, because this approach demands that the value of the unborn always play a part, not the central part, but certainly an important contributory one, in determining a way forward.

South Africa applies this approach in the context of the Choice on Termination of Pregnancy Act.¹⁰² In *Christian Lawyers* (2005),¹⁰³ while dealing with the constitutionality of the Choice on Termination of Pregnancy Act, the court found that the right to terminate a pregnancy is not absolute and went on to acknowledge the state's interest in respecting reproductive decision-making processes. While recognising the importance of women's termination-of-pregnancy rights, the court found that this right, like all constitutional rights, is subject to the limitation clause.¹⁰⁴ Focusing on state interest, Mojaelo J explicitly recognised that "[t]he state has a legitimate role, in the protection of prenatal life as an important value in our society, to regulate and limit the woman's right to choose in that regard".¹⁰⁵ Since the right to terminate a pregnancy is a fundamental constitutional right, state regulation cannot amount to an outright denial of the freedom to exercise the right.¹⁰⁶ Thus, the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as required in terms of section 36 of the Constitution.¹⁰⁷

This case is squarely aligned with the not one/not two approach to pregnancy, because the value in prenatal life is acknowledged, indicating that pregnancy embodies more than one entity. However, the acknowledgement does not go so far as to confer on the unborn an

¹⁰¹ Seymour's discussion of autonomy (in the context of Canada and the USA) goes beyond the scope of this article. Briefly, he suggests that women will benefit from immunity where harm caused to the unborn is a result of women exercising their right to withhold consent to invasive bodily infringements. However, he refrains from answering the question as to whether a woman can be held legally accountable where harm is caused to the unborn by the woman engaging in harmful conduct such as drug abuse or alcoholism.

¹⁰² 92 of 1996.

¹⁰³ 2005 1 SA 509 (T).

¹⁰⁴ 527D.

¹⁰⁵ 527D.

¹⁰⁶ 527E.

¹⁰⁷ 527E. *Christian Lawyers* (2005) can be distinguished from *S v Mshumpa*'s application of the not one/not two approach, in that Froneman J used the relationship between pregnant women and fetuses as a means to *deny* acting on the value of the unborn. Froneman J found that, since the unborn are uniquely connected to the pregnant women carrying them, addressing the harm caused to pregnant women will effectively address the harm caused to the unborn as well; thus there is no need to give legal credence to prenatal life. In contrast, in *Christian Lawyers* (2005), Mojaelo J used the not one/not two approach to recognise the value of the unborn and specifically act on that value, which is achieved in the judge's explanation as to why the right to terminate a pregnancy can be legitimately regulated and limited as pregnancies progress.

entirely separate status with enforceable rights. Rather, this judicial acknowledgement views the unborn in relation to pregnant women and their existing rights. *Christian Lawyers* (2005) can also be distinguished from the cases discussed under the single-entity approach,¹⁰⁸ in that the court not only acknowledged the existence of prenatal life, but also attached value thereto, which value is understood to demand state action for the benefit of the unborn in a qualified way that is respectful of women's rights. Finally, *Christian Lawyers* (2005) demonstrates that the not one/not two approach has every expectation of surviving constitutional muster.

6 Concluding remarks

This article has shown that neither the single-entity nor the separate-entities approaches adequately recognise or engage the connected nature of pregnancy as reflected on by MacKinnon and Lupton. The single-entity approach makes non-entities of the unborn and fails to give effective legal recognition to broader constructs of female reproductive autonomy. Application of the separate-entities approach to pregnancy goes on to make almost obscure non-entities of pregnant women and, where they are recognised, it is on a limited basis and focuses mainly on them as adversarial participants in a pregnancy. Furthermore, neither approach gives effective legal recognition to the values and interests of the unborn. It is therefore concluded that both approaches to pregnancy fail as a result of the very fact that each unsuccessfully grasps the lived experiences of pregnancy.

It is therefore proposed that, when considering pregnancy under the law, the value of the unborn must be recognised, but understood in relation to pregnant women. Understanding the togetherness that pregnancy represents allows the law to recognise both entities that constitute the pregnancy. Any calls for law reform regarding pregnancy, pregnant women or the unborn may essentially fail because their foundational approaches tend to exclude one of the constituent "parties" that forms a pregnancy. Without women, no pregnancies would exist – and the same can be said of the unborn.

The not one/not two approach employs the embodied connectedness of pregnancy as a point of departure, and seeks to advance an inclusive approach to issues stemming from pregnancy. It uses the pregnancy relationship and its context as an interpretative tool in determining a way forward. While this approach may not always place the unborn's interests above those of the pregnant women carrying them, it does require that their interests be considered with reference to the dictates of context. The very fact that South Africa already has the makings of this approach in the judicial interpretation in *Christian Lawyers* (2005) of the Choice on Termination of Pregnancy Act speaks volumes regarding its

108 *Op cit.*

appropriateness and constitutional soundness. It is recommended that the not one/not two approach should therefore receive proper consideration henceforth and, where reform is recommended, those recommendations should be tested against the demands of this approach.